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IN THE

Supreme Court of the United States

October Term, 1967

No. 791

MORTON SOBELL,
Petitioner,

against

UNITED STATES OF AMERICA.

~~MOTION FOR LEAVE TO FILE AN~~ *AMICUS CURIAE* BRIEF IN SUPPORT OF THE PETITION OF MORTON SOBELL

Amicus Curiae,

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To The Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Statement of Interest

Now, Charles Coryell, Bernard T. Feld, William Higinbotham, Seth Neddermeyer and Eugene Rabinowitch respectfully move this Court for leave to file the accompanying brief in support of the petition of Morton Sobell for certiorari. The consent of the attorney for the petitioner herein and the consent of the United States to the filing of the brief are with the Clerk of the Court.

The amicus here are members of that special community of scientists who study those branches of science relevant to atomic energy. As scientists it has been their fate to play roles in the historic development of the atomic bomb by the United States and in the analysis of its impact on American policy. Charles Coryell is professor of chemistry at Massachusetts Institute of Technology, Bernard T. Feld

is professor of physics at Massachusetts Institute of Technology, Seth Neddermeyer is professor of physics at Washington University, William Higinbotham is head of the Instrumentation Division of the Brookhaven National Laboratory, and Past Chairman of the Federation of American Scientists, Eugene Rabinowitch is professor at the University of Illinois and co-founder of the Bulletin of Atomic Scientists and its editor since its inception.

As scientists and as citizens they have had a deep interest in the implications for national policy of the discovery of methods for releasing nuclear energy. They have had a special concern with the problems of communicating to the public and to the government the nature of the discovery of atomic energy. They have had a concern too with the appropriate methods of handling classified information in the area of science; they recognize a need for safeguarding certain scientific information but are sensitive to the consequences to the scientific community and to the public at large of such procedures.

It is in their role as scientist-citizens that they have a special interest in and a concern with this case.

Brief Statement of Argument to be Presented if Leave to File an *Amicus Curiae* Brief is Granted.

I

This case comes to the Court inescapably freighted with its special history. For better or for worse, it has become one of the great political trials of the twentieth century and had attracted world-wide attention.

The history does not perhaps lend the case any special claim to the attention of this Court now some sixteen years after the execution of the Rosenbergs, and sixteen years

too after Mr. Justice Frankfurter's dissent filed three days after their execution had enduringly reminded us: "... only by sturdy self-examination and self-criticism can the necessary habits for detached and wise judgment be established and fortified so as to become effective when the judicial process is again subjected to stress and strain" [346 U.S. 273, 310 (1953)].

Petitioner's application, however, does lay special claim to the attention of this Court. It raises an important question as to the obligations the Constitution imposes on prosecutors, a question whose general significance for American law is not narrowed by the circumstance that it arises in the context of an historic case. It asks whether there are any Constitutional limits on the calculated exaggerations of the prosecutor, at least in capital cases which have an overtone of treason. Where, it asks, is the line between the excesses of adversary prosecutor rhetoric and the conscious creating of a false and prejudicial image. The case thus affords the Court an important opportunity to trace further those principles of prosecutor decency it has been working out in the line of cases from Mooney v. Holohan, 294 U.S. 103 (1935), through *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *Napue* v. *Illinois*, 360 U.S. 264 (1959), to just last term *Miller* v. *Pate*, 386 U.S. 1 (1967) and *Giles* v. *Maryland*, 386 U.S. 66 (1967).

II

In its most summary form, the situation is this: an important step in the original trial sixteen years ago was the evidence as to the confidential atomic energy information the defendants were alleged to have passed to the Russians. That evidence consisted primarily of three items: the oral testimony of David Greenglass, an accomplice who turned state's evidence; the expert testimony of Major Derry, offered as expert testimony, as to the significance of what Greenglass said he transmitted; and a drawing, Exhibit 8,

which was offered as Greenglass's recollection of a sketch of the classified information he had transmitted. For a variety of reasons, some of which at least involved the strategy of defense counsel, Exhibit 8 was impounded at the trial and was not available as part of the public trial record. Some part of the testimony of Greenglass remained public, but the Exhibit and its description had been the centerpiece of the prosecution evidence as to the quality and gravity of the confidential information defendants were charged with having transmitted illegally.

In 1966 appellants obtained a court order, giving them at long last access to the impounded evidence. They then showed the evidence to certain scientists and obtained from them affidavits stating their view of its accuracy and significance.

A motion was made under Sec. 2255 seekig a post-conviction review based, in effect, on the discrepancy between the scientists' affidavits and the image created at the trial, a discrepancy which it was alleged was substantial, highly prejudicial to defendant, and knowingly created by the prosecution.

Judge Weinfeld below denied the motion for a Section 2255 hearing and was affirmed per curiam by the Court of Appeals. In a lengthy and careful opinion Judge Weinfeld held that there was no inconsistency between the affidavits of the scientists and the image of the evidence created at the trial; that it would be legally irrelevant if there had been any inconsistency, given the nature of the precise charge on which the defendants were convicted; and that in any event they had forfeited whatever rights they might otherwise have had by their failure more promptly to get at the impounded evidence and to raise this challenge.

The issue which the petition puts before this Court is whether Judge Weinfeld was correct in denying appellant's petition without granting him an evidentiary hearing. It is

an issue of high significance for the administration of Section 2255, and for the definition in constitutional dimensions of the obligations of the prosecutor.

We would urge that Judge Weinfeld was in error on each of the three premises on which he based his denial of the petition. We would urge that he was in error too in disposing of the issue without an evidentiary hearing. Because of the gravity of the issue and because the evidence is so technical and because there are genuine difficulties of communication between the law and the scientist in matters of this sort the petition cannot rationally be evaluated without recourse to a hearing.

III

The case turns on what might be called *the distance* between the image created by the current affidavits of the scientists and the image created at the trial which is preserved for us in a trial record now sixteen years old. The "measurement" of such distance is avowedly a subtle and difficult matter.

The decisive test of the impression created by the prosecution at the trial is found in the impact it had on the trial judge. When Judge Kaufman turned to the sentencing of the defendant Rosenbergs to death he furnished an indelible summary (R. 1613-15):

> The issue of punishment in this case is presented in a unique framework of history. It is so difficult to make people realize that this country is engaged in a life and death struggle with a completely different system. This [fol. 2450] struggle is not only manifested externally between these two forces but this case indicates quite clearly that it also involves the employment by the enemy of secret as well as overt outspoken forces among our own people. All of our democratic institutions are, therefore, directly involved in this great conflict. I

believe that never at any time in our history were we ever confronted to the same degree that we are today with such a challenge to our very existence. The atom bomb was unknown when the espionage statute was drafted. I emphasize this because we must realize tha we are dealing with a missile of destruction which can wipe out millions of Americans.

The competitive advantage held by the United States in super-weapons has put a premium on the services of a new school of spies—the homegrown variety that places allegiance to a foreign power before loyalty to the United States. The punishment to be meted out in his case must therefore serve the maximum interest for the preservation of our society against these traitors in our midst.

• • •

I consider your crime worse than murder. Plain deliberate contemplated murder is dwarfed in magnitude by comparison with the crime you have committed. In committing the act of murder, the criminal kills only his victim. The immediate family is brought to grief and when justice is meted out the chapter is closed. But in your case, I believe your conduct in putting into the hands of the Russians the A-bomb years before our best scientists predicted Russia would perfect the bomb has already caused, in my opinion, the Communist aggression in Korea, with the resultant casualties exceeding 50,000 and who knows but that millions [fol. 2452] more of innocent people may pay the price of your treason. Indeed, by your betrayal you undoubtedly have altered the course of history to the disadvantage of our country. No one can say that we do not live in a constant state of tension. We have evidence of your treachery all around us every day—for the civilian defense activities throughout the nation are aimed at preparing us for an atom bomb attack.

This is an experienced trial judge speaking at a moment of uttermost solemnity and choosing his words with care. And if this is the way he read the gravity of evidence

presented at the trial, there is no need to speculate on how the jury read it.

This then is the image created at the trial—the mysterious piece of paper had held the most awesome secret in the world, a secret of formidable technical complexity and sophistication and had made possible the transmission of it to the enemy the way one might transmit a unique complicated password.

The scientists' affidavits, although difficult to summarize neatly, convey what is surely a quite different image. Professor Linschitz (314a-338a) notes "a basic ambiguity" as to the principle; "a major lapse" in omitting the tamper shell; the key failure to give any clue as to scale in a matter where precision is all; the kind of thing that would result from an attempt "to condense the results of a 2-billion dollar development effort into a diagram, drawn by a high school graduate machinist on a single sheet of paper." Professor Morrison (339a-349a) notes the testimony and sketch "entirely omit two important spherical components"; that "a grossly false impression" is given of the size of the most costly and critical component; that one element "beryllium" is misdescribed and mislocated; that "a key element polonium" is "entirely" omitted; and in the end summarizes the sketch as "a caricature" of the bomb. Professor Christy (422a-425a) states he is "in detailed agreement" with Professor Morrison's evaluation; that "the sketch contains basic errors and these are compounded by additional errors in the description"; at most it conveys to someone already familiar with the implosion "the germ of the ideas involved."

Further the scientists emphasize that there was no single secret or single principle involved but rather "a complex set of technical tricks, devices and processes combined with an immense and versatile industrial capacity".

This then is the image of the evidence created by the scientists' affidavits—at best a rudimentary, amateurish, marginally useful sketch and description.

The test of the matter, we repeat, is the impact of the prosecution evidence on Judge Kaufman. Would he conceivably have spoken and reacted as he did had any of the scientists' qualifications of Exhibit 8 been introduced at the trial?

IV

Equally important, Judge Weinfeld was in error in holding that any contradiction between the affidavits and the evidence at the trial was irrelevant because the defendants were not charged specifically with transmitting the secret of the atomic bomb, but with transmitting classified information; that therefore even the scientists' diluted version of the Exhibit would support the conviction.

This misconceives the appellant's grievance. The argument is not that the affidavits show the information to have been utterly without value to the Russions, nor is it that the affidavits directly contradict the indictment, and if believed establish the innocence of the defendants. The argument rather is that the affidavits establish the exaggeration that was severely *prejudicial* to the defendants at the trial for at least three reasons:

> i) There was a sharp conflict of testimony in the case between Greenglass and the Rosenbergs and thus a critical issue of credibility. *The fact that Greenglass could produce a sophisticated version of the bomb must have seemed to the jury enormously to underwrite his credibility*; *cf. Alcorta* v. *Texas*, 355 U.S. 28 (1957); *Napue* v. *Illinois*, 360 U.S. 264 (1959).

ii) Evidence that "the very secret of the bomb itself" was implicated must have had a devastating emotional impact on the jury, productive of hatred and hostility toward the defendants.

iii) At the very least the difference between altering the history of the world and an amateurish effort at espionage must rationally have an impact on the penalty; cf. *Brady* v. *Maryland*, 373 U.S. 83 (1963).

V

Judge Weinfeld did not find it necessary to address himself to the third leg of appellant's argument, namely, that the government had consciously created the false impression.

The government was unequivocal in its assertion throughout the trial that Greenglass was transmitting the "very bomb itself".

It set the stage with its opening statement to the jury: ". . . an elaborate scheme which enabled them to steal through David Greenglass this one weapon which might well hold the key to the survival of this nation and means the peace of the world—the atomic bomb . . . the evidence will show how . . . Greenglass stole . . . sketches and descriptions of secrets concerning atomic energy and sketches of the very bomb itself" (R. 183).

In the direct examination of Greenglass he is asked point blank: "Did you draw up a sketch of the atom bomb itself?" (R. 497). And in the next ten questions, Mr. Cohn put to him, the phrase "atom bomb" appears four more times (R. 497-8).

The expert witness, Col. Derry, is used expressly to authenticate "the cross-section sketch of the bomb" (R. 908) and is asked whether the testimony and the sketch:

"demonstrate substantially and with substantial accuracy the principle involved in the operation of the 1945 atomic bomb."

And in its closing the government reminds the jury: "You heard Mr. Derry who testified in respect to Exhibit 8 the cross-section of the atom bomb itself, the Nagasaki bomb" (R. 1518) and confidently tells it: "We know that these conspirators stole the most important secrets ever known to mankind . . ." (R. 1519).

One detail in the record, apparently trivial, now takes on significance. Pursuant to the mandate of 18 U.S.C. § 3432, a provision designed as a special protection for defendants in treason and capital cases, the government filed just before the start of the trial "a list of the witnesses to be produced on the trial for proving the indictmet." The list contained some 100 names but only 22 were actually called. Of more interest, however, is the circumstance that the list included General Groves and three of the world's most distinguished atomic scientists: George Kistiakowski, J. Robert Oppenheimer,* and Harold C. Urey. None of the four were called at the trial and the petition now alleges that Dr. Urey had been unaware he had been listed as a government witness and had never been contacted by the government (229a). The list, however, played a role in the voir dire. It was read to the prospective jurors and they were asked if they knew any of those listed (R. 52). At least two jurors were to raise questions about their degree of contact with Dr. Oppenheimer and Dr. Urey (R. 137, R. 156).

Perhaps the deliberate listing of distinguished witnesses it had no intention of calling was just a petty ignoble

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* As petitioner's counsel states in his brief, there is available in the records of this case a letter from Dr. Oppenheimer dated October 25, 1966, stating in response to a question as to whether he had ever been asked to be a witness, "No one ever asked me to appear and no one indicated to me what I might be asked were I to appear."

strategy on the part of the government designed to intimidate the defense. But it now would appear also to have been part of a larger strategy of creating in the minds of the court and jury an impression that they were dealing with a matter of the highest scientific sophistication and that the government had the highest scientific credentials on its side.

And in this context the government's selection of Col. Derry as its expert for for the purpose of authenticating the accuracy of Exhibit 8 emerges as a major puzzle. The point goes not to Derry's integrity nor to his being in some sense an expert but rather to the circumstance as Professor Morrison notes (346a) that Derry who was an engineer and liaison officer would seem to have lacked the intimate scientific experience with the bomb, available to so many scientists accessible to the government, that would compel him to add qualifications to the Greenglass version. And it is to be noted that the government chose Derry as its expert for its most crucial and technical scientific point in the trial while finding it unnecessary to call upon Dr. Urey, Dr. Oppenheimer, Dr. Kistiakowski or for that matter Dr. Koski whom they had used on another point.

In *Miller* v. *Pate,* 386 U.S. 1 (1967), this Court reversed a murder conviction where the prosecutor had displayed to the jury a pair of paint-stained shorts and misrepresented the paint stains as blood stains. The essence of appellant's charge is that the prosecution was holding before the jury paint-stained shorts in this case too.

VI

Judge Weinfeld also erred in charging the appellant with laches in failing to seek to unimpound the evidence and to raise their point earlier, and in finding the current motion for review repetitious of the prior motions made unsuccessfully by the appellant.

It is most doubtful as a matter of law that a doctrine such as laches is appropriate where section 2255 is involved; *Price* v. *Johnston*, 334 U.S. 266 (1947); *Sanders* v. *U.S.*, 373 U.S. 1 (1962); and in any event as a matter of fact it is most difficult to see a lack of diligence in appellant's efforts to get at the impounded evidence. Moreover, until the decision on the impounded evidence, scientists engaged on the project, could not safely speak concretely about any defects in the sketch in question.

Nor is it seemly for Judge Weinfeld to show impatience with appellants for taxing the judicial process with this sixth post-conviction effort. It is obviously not duplicative of the other motions and it raises a point that is surely not frivolous. The historic political significance this case has taken on may not entitle appellant to any favors from the law. It is important that it not in the end deprive him of its equal protection.

VII

There remains then the final step in the argument—to connect these matters with the defendant Sobell in view of the fact that there was no connection at the trial that *he* was engaged directly in the transmission of the atomic bomb. Two points need be made. First, given the stress of the times and the drama of the case, Sobell by being tried with the Rosenbergs was made inevitably a partner in their fate. The credibility of the case against them inevitably affected the credibility of the case against him, the emotion and hostility against them inevitably infected the mood toward him, the perception of the gravity of the Rosenberg offense inevitably affected the perception of the gravity of the Sobell offense. The more the evidence was made to appear to show a skillful professional espionage ring, the more likely Sobell's complicity would have appeared to the jury, as compared with a case where the evidence showed a bungling amateur effort at most. Second, it will be re-

membered that in the original appeal in the case, Judge Frank dissented arguing that it was error to have tried Sobell with the Rosenbergs as engaged in a single conspiracy. *United States* v. *Rosenberg*, 195 F. 2d 583 (CA 2d 1952). The calculated exaggeration by the prosecution of the atomic bomb evidence was, certainly as prejudicial to Sobell as to the Rosenbergs.

CONCLUSION

For the foregoing reasons and in view of the important principles of law involved as to the obligations of prosecution and in view of the historic importance of this case itself, it is respectfully urged in our role as amicus curiae that this petition for certiorari be granted.

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